

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JEFFERY B. MAXWELL, JR.**

Claimant

VS.

**GENERAL MOTORS CORPORATION**

Self-Insured Respondent

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Docket No. 1,032,138

**ORDER**

Claimant appeals the October 15, 2008, Award of Administrative Law Judge Steven J. Howard (ALJ). Claimant was awarded benefits for a 4 percent permanent partial whole body disability for injuries suffered on October 14, 2006.

Claimant appeared by his attorney, Donald T. Taylor of Kansas City, Kansas. Respondent appeared by its attorney, Peter J. Chung of Kansas City, Missouri.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on March 4, 2009.

**ISSUE**

What is the nature and extent of claimant's injuries from the accident on October 14, 2006? Claimant contends that he suffered a 15 percent whole body permanent disability based on the opinion of board certified emergency medicine and preventative medicine specialist P. Brent Koprivica, M.D. Respondent argues that the rating adopted by the ALJ from board certified orthopedic surgeon Edward J. Prostic, M.D., is the most persuasive and should be affirmed by the Board. Respondent argues further that since Dr. Prostic was the court appointed independent medical examiner, his opinion should carry more weight than that of claimant's hired expert.

### FINDINGS OF FACT

Claimant had worked on respondent's assembly line for several years, when, on October 14, 2006, he was struck by a forklift and seriously injured. Claimant was taken to the North Kansas City Hospital where he was hospitalized for seven days. He suffered a lacerated liver, a laceration on his ankle and injuries to his cervical spine, thoracic spine and kidney. CT scans of claimant's head and cervical spine were negative for fracture. A CT scan of the abdomen and pelvis revealed hemoperitoneum and a liver laceration. Claimant remained off work for approximately three months. He attempted to return to work at the end of December 2006, but was not physically ready. He then returned to work a second time in January 2007, and has successfully remained at work since that time. Claimant's current complaints include pain in his mid section from playing basketball too hard or exercising too hard, and pain in his shoulder and neck with too much lifting.

Claimant was examined at the request of his attorney by Dr. Koprivica on February 16, 2007. He was found to suffer from intermittent stiffness in his neck and abdominal discomfort with forceful activities and repetitive straining and lifting. Based on the fourth edition of the *AMA Guides*,<sup>1</sup> claimant was rated at 5 percent for the cervicothoracic spine impairment and 10 percent for the liver injury. Dr. Koprivica testified that the injury to claimant's liver would result in scar tissue forming. He stated that this would result in some loss of organ function. In rating the liver damage, he used Chapter 10, Table 6 of the *AMA Guides*,<sup>2</sup> which rates a Class 1 liver problem at between 0 and 14 percent whole body impairment. Dr. Koprivica rated claimant at 10 percent to the whole body for the liver injury. This, when combined with the cervicothoracic rating, results in a whole body 15 percent impairment.

Dr. Koprivica agreed that the fourth edition of the *AMA Guides*<sup>3</sup> listed objective evidence of liver disease as a criteria for a permanent rating. He discussed biochemical abnormalities as an example of objective evidence of liver disease. However, claimant had no biochemical abnormalities. Dr. Koprivica assessed claimant an impairment for the liver based on the resulting scarring. He believed the scarring was what was causing claimant discomfort while pushing and pulling. But, Dr. Koprivica then agreed that he was unaware of any literature which identified how the scarring caused pain symptoms. He also agreed that some people have scarring without complaints.

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

<sup>2</sup> *AMA Guides* (4th ed.).

<sup>3</sup> *AMA Guides* (4th ed.).

Claimant was referred to Dr. Prostic by the ALJ for an IME on October 16, 2007. The history presented to Dr. Prostic was consistent with that provided to Dr. Koprivica. Claimant presented complaints to the right shoulder and cervical spine with stiffness in the morning. Range of motion of the neck, lumbar spine and right shoulder were satisfactory. Based on residual symptoms in the neck, right shoulder and low back, Dr. Prostic rated claimant at 4 percent to the whole body. He found no impairment to claimant's liver from this accident. He was unable to identify objective evidence of persistent liver disease or biochemical abnormalities, requirements in the *AMA Guides*<sup>4</sup> before a rating would be appropriate for liver damage. Dr. Prostic also testified that claimant voiced no complaints to him in the area of the liver during his examination of claimant. He also doubted that lifting weights would be an activity which would cause increased pain in the area of the liver. Dr. Prostic opined that chest wall or spine problems would be more likely the cause of the pain described by claimant. On cross-examination, Dr. Prostic acknowledged that claimant complained of neck stiffness and tenderness of the trapezius muscle. Claimant also reported popping in his right shoulder. The 4 percent rating was split about half for the neck and half for the shoulder. Dr. Prostic agreed that he would probably change the rating if abnormal liver function tests were produced. He agreed that the trauma suffered by claimant was significant enough to cause harm to claimant's internal organs. Dr. Prostic found no indication of low back residual complaints to justify a rating under the *AMA Guides*.<sup>5</sup>

### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>6</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>7</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

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<sup>4</sup> *AMA Guides* (4th ed.).

<sup>5</sup> *AMA Guides* (4th ed.).

<sup>6</sup> K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

<sup>7</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>8</sup>

The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service.<sup>9</sup>

Here, there is no dispute that claimant suffered a significant accident which arose out of and in the course of his employment with respondent. The significant dispute arises with the extent of those injuries.

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.<sup>10</sup>

Injury or personal injury has been defined to mean,

. . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.<sup>11</sup>

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>12</sup>

There are two opinions in this record dealing with claimant's functional impairment. Dr. Koprivica found not only permanent impairment from claimant's cervical injury, but also from the laceration to claimant's liver. In citing the *AMA Guides*<sup>13</sup>, Dr. Koprivica

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<sup>8</sup> K.S.A. 2006 Supp. 44-501(a).

<sup>9</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984).

<sup>10</sup> *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

<sup>11</sup> K.S.A. 2006 Supp. 44-508(e).

<sup>12</sup> K.S.A. 44-510e(a).

<sup>13</sup> *AMA Guides* (4th ed.).

acknowledged that Chapter 10, Table 6 of the fourth edition requires objective evidence of liver disease as a criteria for a permanent rating. This objective evidence includes biochemical abnormalities or primary disorders of bilirubin metabolism being present. Dr. Koprivica agreed that no such abnormalities existed in this situation. Dr. Koprivica stated that scarring could be causing claimant's pain, but then agreed that he had no literature which identified liver scarring as causing pain.

Dr. Prostic examined claimant at the request of the ALJ. He found no impairment to claimant's liver, being unable to identify any objective evidence of persistent liver disease as is required by the *AMA Guides*.<sup>14</sup> Additionally, Dr. Prostic testified that claimant voiced no complaints to him in the area of his liver during his examination of claimant. The Board finds the opinions expressed by the court appointed examiner, Dr. Prostic, to be the most persuasive in this instance. Claimant has failed to prove that under the *AMA Guides*, he suffered a ratable permanent impairment to the liver as a result of the accident on October 14, 2006. The Award of the ALJ granting claimant a 4 percent whole body disability is affirmed.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant suffered an injury but has failed to prove that he suffered a ratable permanent impairment of function to his liver as a result of the accident on October 14, 2006.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated October 15, 2008, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

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<sup>14</sup> *AMA Guides* (4th ed.).

Dated this \_\_\_\_ day of March, 2009.

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BOARD MEMBER

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**DISSENT**

I respectfully disagree with the majority and find that claimant has sustained impairment to his liver as a result of his October 14, 2006, accident. As indicated by Dr. Koprivica, the liver injury has affected claimant's ability to lift, push and pull. Consequently, claimant should receive disability benefits for that injury.

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BOARD MEMBER

c: Donald T. Taylor, Attorney for Claimant  
Peter J. Chung, Attorney for Respondent  
Steven J. Howard, Administrative Law Judge